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Supreme Court, U.S.
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No. 07-149

In the Supreme Court of the United States

FLUOR ENTERPRISES, INC.,
Petitioner,

v

REVENUE DIVISION OF THE DEPARTMENT OF TREASURY, STATE OF MICHIGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 53 (c) of the Michigan Single Business Tax Act, MCL 208.53(c), repealed effective December 31, 2007, provides that receipts derived from services performed outside Michigan for construction activities within Michigan are considered Michigan receipts for tax apportionment purposes. Does § 53(c) violate the Commerce Clause, US Const, art I, § 8, cl 3?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 2

ARGUMENT 4

MCL 208.53(c) Does Not Violate the Principle of Internal Consistency 5

MCL 208.53(c) Does Not Violate the Principle of External Consistency 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

American Trucking Ass'n v Scheiner,
483 US 266; 107 S Ct 2829; 97 L Ed 2d 226 (1987)..... 5

Armco Inc v Hardesty,
467 US 638; 104 S Ct 2620; 81 L Ed 2d 540 (1984)..... 5

Complete Auto Transit, Inc v Brady, 430 US 274, 279; 97
S Ct 1076; 51 L Ed 2d 326 (1977)..... 3

Container Corp v Franchise Tax Bd,
463 US 159; 103 S Ct 2933; 77 L Ed 2d 545 (1983)..... 5

Goldberg v Sweet,
488 US 252 (1989)..... 7

Oklahoma Tax Commission v Jefferson Lines,
514 US 175; 115 S Ct 1331; 131 L Ed 2d 261 (1995).... 6, 7

Trinova Corp v Michigan Treasury Dept,
498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991)..... 7

Statutes

MCL 208.53 1

MCL 208.53(c)..... passim

MCL 600.6401 et seq. 2

Michigan Public Act 235 of 2006 5

Constitutional Provisions

U S Const, art I, § 8, cl 3 3

OPINIONS BELOW

The opinion of the Michigan Supreme Court (Pet App. 1-28) is reported at 477 Mich 170, 730 NW2d 722 (2007). The opinion of the Michigan Court of Appeals (Pet App. 30-49) is reported at 265 Mich App 711, 697 NW2d 539 (2005).

JURISDICTION

The judgment of the Michigan Supreme Court was entered on May 2, 2007. The petition for a writ of certiorari was filed on July 31, 2007. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Michigan Compiled Laws, MCL 208.53 (repealed by 2006 Public Act 325, effective December 31, 2007):

> Sales, other than sales of tangible personal property, are in this state if:
>
> (a) The business activity is performed in this state.
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

STATEMENT

1. The parties to this dispute executed a Stipulation of Facts used by courts below to decide this matter. Pet App 53-57. In particular, the Stipulation of Facts indicated that Petitioner Fluor is a multi-national engineering, construction, and technical service company with its principal place of business in Irvine, California. Pet App 54, ¶ 1, 4. At issue are services Fluor performed for Michigan construction projects. Pet App 55, ¶ 7. Fluor performed construction management and construction material procurement activities in Michigan for these projects. Pet App 54, ¶ 6. It also conducted engineering and architectural services for Michigan projects at Fluor facilities outside of Michigan. Pet App 55, ¶ 7. A Single Business Tax audit of Fluor by Respondent Michigan Department of Treasury revealed that Fluor, in determining the sales factor for apportionment purposes, had counted its management and procurement activities in Michigan as Michigan sales but had neglected to include engineering and architectural services performed for Michigan construction projects at Fluor California offices as Michigan sales. Pet App 55, ¶ 12. As a result of the Single Business Tax audit, Fluor was assessed for the deficiency for tax in the amount of $182,312.00, and interest of $161,028.96. Pet App 13-14, ¶ 13. Fluor paid the assessment under protest and sought a refund of $343,618.31 plus additional accrued interest. Pet App 57, 21.

2. Fluor then filed an appeal in the Michigan Court of Claims.[1] The Department of Treasury's position was that for tax apportionment purposes, § 53(c) of the Michigan Single Business Tax Act, "SBTA," MCL 208.53(c), mandated that Fluor treat receipts for services obtained outside Michigan, but used for Michigan construction projects, as Michigan sales. Fluor argued that Michigan's position was not supported by the statutory language. Fluor also argued that the position taken by the Michigan Department of Treasury, if correct, violated the

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[1] The Michigan Court of Claims was created by the Michigan Legislature with exclusive jurisdiction to hear and determine all claims against the State. MCL 600.6401 et seq.

Commerce Clause of the U S Constitution.[2] At the Court of Claims the parties filed cross motions for summary disposition. The Court of Claims ultimately denied the Department of Treasury's motion and granted Fluor's, holding that the Department of Treasury's proposed statutory interpretation was incorrect, as § 53(c) of the SBTA limited Michigan sales to services performed in Michigan. Pet App 50-52.

3. The Michigan Department of Treasury filed its claim of appeal to the Michigan Court of Appeals. The Michigan Court of Appeals reversed the State law determination of the Michigan Court of Claims that § 53(c) of the SBTA limited Michigan sales to services performed in Michigan for construction projects in Michigan. Pet App 30-49. Having found that the Court of Claims had erroneously interpreted the State statute in question, the Michigan Court of Appeals then examined Fluor's Commerce Clause challenge to the tax at issue.[3] The Michigan Court of Appeals noted that an examination of a Commerce Clause challenge to a State tax encompasses a review of the four-part test set forth by this Court in the case of *Complete Auto Transit, Inc v Brady*,[4] which provides that a State tax is constitutionally valid under the Commerce Clause if the tax[5]:

> (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state.

As Fluor had only raised a challenge in its original complaint to the tax under the first two prongs of this test, the Court of

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[2] U S Const, art I, § 8, cl 3

[3] Fluor's Commerce Clause challenge had not been examined by the lower court as that court had accepted Fluor's proposed statutory interpretation of § 53(c) of the SBTA.

[4] *Complete Auto Transit, Inc v Brady*, 430 US 274; 97 S Ct 1076; 51 L Ed 2d 326 (1977).

[5] *Complete Auto Transit, Inc*, 430 US at 279

Appeals only examined the first and second prongs, finding that the tax at issue was applied to an activity having a substantial nexus with the taxing State but that the tax at issue was not "fairly apportioned." Pet App 47-49.

In determining whether the tax at issue was "fairly apportioned" so as to pass a Commerce Clause challenge, the Court of Appeals correctly noted that two components must be satisfied: the tax must be both "internally" and "externally" consistent. "Internal consistency" means that "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result[.]" "External consistency" examines whether the choice of factors used in apportionment "reasonably reflects the in-State component of the activity being [apportioned]." Pet App 47. As Fluor did not challenge the external consistency component, the Court of Appeals examined only the internal consistency component, finding that the tax at issue failed the internal consistency test.[6] Pet App 48-49. The Michigan Court of Appeals denied the Department's motion for reconsideration. Pet App 29.

4. Both parties filed applications for leave to appeal to the Michigan Supreme Court, which were granted. The Court issued majority and concurring opinions, Pet App 1-28, in which all seven Justices of the Michigan Supreme Court agreed, albeit for different reasons, that the State law determination of the Michigan Court of Appeals regarding the interpretation to be given § 53(c) of the SBTA was correct. All seven Justices also agreed that statute did not violate the Commerce Clause.

ARGUMENT

The opinion of the Michigan Supreme Court is correct and does not conflict with a decision of this Court, any decision of a United States Court of Appeals, or any decision of another State

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[6] For all practical purposes the "internal consistency" test was raised *sua sponte* by the Court of Appeals in its April 14, 2005 Opinion. Neither party really briefed or argued the issue before that time.

court of last resort. While the opinion does deal with a federal question—whether a State tax conflicts with the Commerce Clause—the Michigan Supreme Court decided the question correctly. The situation is not likely to recur, since the statute at issue has been repealed.[7]

MCL 208.53(c) Does Not Violate the Principle of Internal Consistency

As recognized by both the majority and concurring opinions of the Michigan Supreme Court, MCL 208.53(c) does not violate the Commerce Clause, as the services that it characterizes as Michigan sales for apportionment purposes are those services performed for construction projects that take place in Michigan. The statute treats services performed for a construction project as sales of the State where the construction project takes place. Because of this treatment, it is clear that § 53(c) meets the internal consistency test first articulated by this Court in *Container Corp v Franchise Tax Bd,*[8] in which this Court cited "internal consistency" as an analytical tool to determine whether a State's apportionment formula was fair. Under the internal consistency test "the [apportionment] formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed."[9] In *American Trucking Ass'n v Scheiner,* this Court explained[10]:

> To pass the 'internal consistency' test, a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'

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[7] Michigan Public Act 235 of 2006, effective Decemeber 31, 2007.

[8] *Container Corp v Franchise Tax Bd,* 463 US 159; 103 S Ct 2933; 77 L Ed 2d 545 (1983).

[9] *Container Corp,* 463 US at 169.

[10] *American Trucking Ass'n v Scheiner,* 483 US 266, 284; 107 S Ct 2829; 97 L Ed 2d 226 (1987), quoting *Armco Inc v Hardesty,* 467 US 638, 644; 104 S Ct 2620; 81 L Ed 2d 540 (1984).

The internal consistency test was intended to measure whether interstate commerce was burdened if every State adopted the same type of tax. In *Oklahoma Tax Commission v Jefferson Lines*, this Court reiterated that the internal consistency test examined the form and structure of a tax[11]:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, **but simply looks to the structure of the tax at issue** to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

In the present case, as recognized by both the majority and concurring opinions of the Michigan Supreme Court, because § 53(c) considers services that occur outside Michigan as Michigan sales only when they relate to Michigan construction projects, if every other State had a tax similar to Michigan's Single Business Tax, those other States also would include within their tax bases only those services relating to construction projects in their respective States. For example, if California had a tax similar to Michigan's Single Business Tax and if services for a construction project in California were obtained in Michigan for that project, the services would be included in California's sales and excluded

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[11] *Oklahoma Tax Commission v Jefferson Lines*, 514 US 175, 185; 115 S Ct 1331; 131 L Ed 2d 261 (1995) (emphasis added).

from Michigan's. Because the sales for the services are sourced to the State where the construction project takes place, there is no possibility of multiple taxation and thus no violation of the internal consistency test. Under the internal consistency test, if other States adopted a provision like § 53(c), they too would source to themselves the services performed for construction activities in their States. The Michigan Supreme Court construed § 53(c) to the effect that receipts derived from services performed for construction projects in other States are receipts included in the sales apportionment factor of the State where the construction occurs. Such construction renders the statute constitutional.

MCL 208.53(c) Does Not Violate the Principle of External Consistency

At pages 14-15 of its Petition for Writ of Certiorari, Fluor raises the issue of external consistency. Whether a State tax meets the external consistency test relies on whether that State's tax "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State"[12] and "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[13] The Michigan tax at issue passes the external consistency test because MCL 208.53(c) includes within its apportionment formula only those receipts for services performed out-State that are in furtherance of in-State construction projects. A construction project is made up of more than just steel and concrete; it also includes, as in Fluor's case, services purchased to complete and coordinate the actual construction activity. This Court has recognized that Michigan's Single Business Tax is a "value-added" tax that is a measure of a firm's total business activity.[14] Because the tax is a measure of total business activity, a construction project in Michigan is measured by more than just the value of the component parts of

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[12] *Jefferson Lines*, 514 US at 185.

[13] *Goldberg v Sweet*, 488 US 252, 262 (1989).

[14] *Trinova Corp v Michigan Treasury Dept*, 498 US 358, 364; 111 S Ct 818; 112 L Ed 2d 884 (1991).

the construction. That project also contains value, added to Michigan's economy, attributable to the services purchased to complete that Michigan construction project. The fact that § 53(c) includes in the apportionment formula the out-State services involved in completion of that Michigan construction project simply recognizes economic reality and correctly apportions that part of a taxpayer's tax base to Michigan. Section 53(c) does not violate the external consistency test.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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